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DIVISION II

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STATE OF WASHINGTON

No. 47850-1-II

IN THE COURT OF APPEALS, DIVISION II

DEPUTY

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

JOSE R. CASTRO-LINO,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE

STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Robert A. Lewis, Judge

Clark County Superior Court Cause No. 14-1-01530-5

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**APPELLANT'S OPENING BRIEF**

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## TABLE OF CONTENTS

	Page
1. TABLE OF CONTENTS.....	i, ii
2. TABLE OF AUTHORITIES.....	ii, iii
3. ISSUES AND ASSIGNMENT OF ERROR.....	iv, v
4. STATEMENT OF THE CASE.....	1
5. ARGUMENTS.....	16
<b><i>A. The Court erred when it denied the Defendants motion for a new trial based upon the defendant being prevented from testifying at his trial by his trial attorney.....</i></b>	<b><i>17</i></b>
<b><i>B. It was ineffective assistance of counsel for the substitute, post-trial attorney to fail to elicit from Mr. Castro-Lino how he would've testified had he been allowed to testify at his trial, and such ineffective assistance of counsel requires a remand for an evidentiary hearing to make such determination.....</i></b>	<b><i>19</i></b>
<b><i>C. It was ineffective assistance of counsel to fail to object to the prosecuting attorney's inflammatory comments and expressions of personal belief, and such misconduct by the prosecuting attorney requires reversal of the Defendant's conviction.....</i></b>	<b><i>21</i></b>
<b><i>D. It was ineffective assistance of counsel to fail to object when the prosecuting attorney committed prosecutorial misconduct by shifting the burden of proof by stating that the Defendant Bore the responsibility of establishing why Ms. Lattiak would falsely accuse him of rape, and such misconduct by the prosecuting attorney requires reversal of the Defendant's conviction.....</i></b>	<b><i>23</i></b>
7. CONCLUSION.....	26

8. CERTIFICATE OF SERVICE.....	27
--------------------------------	----

## **TABLE OF AUTHORITIES**

	Page
 <b><u>FEDERAL CASES</u></b>	
<i>Berger v. United States</i> , 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 935).....	32
<i>United States v. Butts</i> , 630 F.Supp. 1145, 1147 (D.Me.1986).....	24
<i>Donnelly v. DeChristoforo</i> , 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).....	32
<i>Jordan v. Hargett</i> , 34 F.3d 310, 312-13 (5th Cir.1994).....	24
<i>Lema v. United States</i> , 987 F.2d 48, 53 (1st Cir.1993).....	24, 25
<i>United States v. Robles</i> , 814 F.Supp. 1233, 1242 (E.D.Pa.1993).....	24
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	27
<i>United States v. Teague</i> , 908 F.2d 752, 759 (11th Cir.1990).....	24
<i>United States v. Williams</i> , 504 U.S. 36, 112 S.Ct. 1735, 118 L.Ed.2d 352, 60 U.S.L.W. 4348 (1992).....	31

## **STATE CASES**

<i>State v. Cheatham</i> , 150 Wn.2d 626, 652, 81 P.3d 830 (2003).....	30
--	----

<i>State v. Gregory</i> , 158 Wn.2d 759, 859-61, 147 P.3d 1201 (2006).....	30
<i>State v. Guizzotti</i> , 60 Wn.App. 289.....	28
<i>State v. Hardy</i> , 37 Wash.App. 463, 466-67, 681 P.2d 852 (1984).....	25
<i>State v. King</i> , 24 Wash.App. 495, 500, 601 P.2d 982 (1979).....	25
<i>State v. McKenzie</i> , 157 Wn.2d 44, 52, 134 P.3d 221 (2006).....	30
<i>State v. Osman</i> , 192 Wn.App. 355 (Wash.App.Div 1 2016).....	31
<i>State v. Pirtle</i> , 127 Wn.2d 904 (1995).....	28
<i>State v. Reed</i> , 102 Wn.2d 140, 684P.2d 699 (1984).....	28
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004).....	26,27
<i>State v. Robinson</i> , 138 Wn.2d at 768.....	27
<i>State v. Sutherby</i> , 165 Wn.2d 870, 883, 204 P.3d 916 (2009).....	27
<i>State v. Thomas</i> , 128 Wash.2d 553, 558, 910 P.2d 475 (1996).....	24
<i>State v. Thorgerson</i> , 172 Wn.2d 438, 453, 258 P.3d 43 (2011).....	30
<i>State v. Warren</i> , 165 Wn.2d 17, 26, 195 P.3d 940 (2008).....	30

#### CONSTITUTIONAL PROVISIONS

Sixth Amendment, U.S. Constitution.....	26
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## **ISSUES AND ASSIGNMENTS OF ERROR**

**Assignment of Error Number 1.** The Court erred when it denied Mr. Castro-Lino's motion for a new trial.

**Assignment of Error Number 2.** The substitute trial attorney rendered ineffective assistance of counsel by failing to elicit from Mr. Castro Leno what his testimony would have been had he testified at trial.

**Assignment of Error Number 3.** The substitute trial attorney rendered ineffective assistance of counsel by failing to object to the prosecutor's inflammatory statements and statements of personal belief as to the credibility of the State's primary witness.

**Assignment of Error Number 4.** The trial attorney rendered ineffective of assistance of counsel by failing to object when the prosecuting attorney shifted the burden of proof to Mr. Castro-Lino to explain why Ms. Lattiak would falsely accuse him rape.

**Assignment of Error Number 5.** The trial attorney rendered ineffective assistance of counsel by failing to object when the prosecuting attorney mis-stated the State's burden of proof of beyond a reasonable doubt.

### **Issues**

i. ***Whether the Court erred when it denied the Mr. Castro-Lino's motion for a new trial.***

*ii. Whether it was ineffective assistance of counsel for the substitute, post-trial attorney to fail to elicit from Mr. Castro-Lino how he would have testified had he been allowed to testify at his trial.*

*iii. Whether it was ineffective assistance of counsel to fail to object to the prosecuting attorney's inflammatory comments and expressions of personal belief.*

*iv. Whether it was ineffective assistance of counsel to fail to object when the prosecuting attorney committed prosecutorial misconduct by shifting the burden of proof to the Defendant to explain why Ms. Lattiak would falsely accuse him of rape.*

*v. Whether it was ineffective assistance of counsel to fail to object when the prosecuting attorney committed prosecutorial misconduct by mis-stating the law and reducing the State's burden of proof.*

### **STATEMENT OF THE CASE**

On January 28th, 2014, Vancouver police detective Carol Boswell, who had previously been assigned to the case, met with Marissa Lattiak, regarding an allegation of rape. RP 175. Detective Boswell took Ms. Lattiak's statement at the lobby interview room of the Vancouver Police Department. RP 175. Ms. Lattiak was calm during the interview. RP 176. Following her meeting with Ms. Lattiak, Detective Boswell contacted the defendant, José Castro-Lino, who gave her a recorded statement regarding the allegations of rape. RP 181. During the recorded statement, Mr. Castro-Lino denied the allegations and stated that he had little memory of the events surrounding the allegation due to being highly intoxicated. RP 189, Exh. 4.

On the same day that Ms. Lattiak claim to have been raped, she went to the Peace Health Southwest Hospital for an examination and was given a rape exam, the sexual assault kit evidence for which was retrieved by Vancouver police officer John Key and placed into evidence for this case. RP 174.

During trial, detective Boswell testified regarding her investigation, and Mr. Castro-Lino's recorded statement she obtained was played in open court for the jury. RP 189, Exh. 4. Following the investigation, Mr. Castro-Lino was ultimately arrested on January 30, 2015.

Prior to trial, during motions in limine, Mr. Castro-Lino's defense attorney stated that he would be having an expert, Dr. Riesberg, testify about "the effects of alcohol on one's memory." RP 76, 77. The defense attorney went on to say that "Dr. Riesberg is a memory expert. He'll be able to let the jury understand what (unintelligible) intoxication will cause someone to have a blackout, that's the issue here. Mr. Castro-Lino had told Detective Boswell that he didn't remember what happened because he had been drinking, so that's the issue". RP 77.

The defense attorney also said, "other potential issue is if Mr. Castro-Lino testifies, there are other details that weren't disclosed to Detective Boswell at the time of the interview in March 2014 that are subsequent recall, so Dr. Riesberg would be able to testify as to being able to recall memories that were previously not being able to be remembered." RP 77. The expert was not called as a witness.

At trial, Ms. Lattiak identified Mr. Castro-Lino and said that she knew him as the boyfriend of her friend's mother. RP 89. Her friend's name was Chris. RP 90. Ms. Lattiak had met Mr. Castro-Lino two or three times before when she was at Chris's house. RP 91. The prosecuting attorney also elicited from Ms. Lattiak that she had been a vegetarian since January, 2011. RP 92.

On January 4, 2014, Ms. Lattiak went to Chris and Mr. Castro-Lino's home after she finished her work shift at about 2:00 AM. RP 93. She arrived at Chris and Mr. Castro-Lino's home at about 3:00 AM. RP 96. At Chris and Mr.

Castro-Lino's home, Ms. Lattiak had a “couple of beers” and perhaps a rum and Coke. RP 96, 97. She may have also smoked marijuana. RP 97. During the evening, Ms. Lattiak socialized with everyone at the home, including Mr. Castro-Lino. RP 99. At approximately between 4:00 AM and 5:00 AM, Ms. Lattiak went to to sleep in Chris's downstairs bedroom on the bed alongside another houseguest, nicknamed "Moody". RP 100-101, 103.

After falling asleep on her stomach, Ms. Lattiak "felt penetration" and, "Just not thinking anything of it, ... rolled over onto [her] back". RP 104. A couple of moments later, she felt that she was being penetrated again and then woke up fully. Id. During each penetration, Ms. Lattiak testified that she was unable to determine whether it was vaginal or anal penetration. RP 106. Ms. Lattiak was also unable to recall how many times she had been penetrated or with what she had been penetrated. Id.

Before she awoke, Ms. Lattiak could feel breathing on her face and then opened her eyes to see Mr. Castro-Lino on top of her. RP 107. Ms. Lattiak immediately arranged for transportation away from Chris and Mr. Castro-Lino's home and arranged to go to the Peace Health Southwest hospital, accompanied by her friend, Hannah. RP 109-110. The prosecuting attorney asked Ms. Lattiak whether her visit at the hospital had been “a pleasant or unpleasant experience”, to which she replied, “[it] was unpleasant”. RP 112. Regarding her later interview

with Detective Boswell in a conference room at the police station, the prosecuting attorney asked if the interview had taken place in a "more comfortable or less comfortable setting to talk about this than here in the courtroom", to which Ms. Lattiak replied, "[i]t was definitely more comfortable there". RP 113. The prosecuting attorney then asked Ms. Lattiak, "[a]re you nervous at all today?". Id. Ms. Lattiak responded, "[y]es". Id.

On cross examination, Ms. Lattiak identified 16 people to whom she had spoken about her allegations of rape. RP 117-118. Ms. Lattiak also testified that she had "[n]o injuries" and remembered "a little bit of pain from the penetration, but that's about it". RP 120-121. Ms. Lattiak had never had anal sex before. RP 123.

Sexual Assault Nurse Examiner "SANE" nurse Stacy Lefebvre, the nurse who examined Ms. Lattiak, testified that she did not encounter injuries during sexual assault exams in approximately 70 to 80% of the examinations that she administers. RP 136. Without further foundation, nurse Lefebvre testified that this lack of injuries included cases of anal penetration or rape. Id. She also testified that, during her examination of Ms. Lattiak, the same anal swab used to collect evidence was swabbed both on the interior and exterior of Ms. Lattiak's rectum. RP 147.

On cross examination, nurse Lefebvre testified that occasionally, in reported cases of anal rape, one "might see a fissure, like a, like a tiny laceration, but not necessarily", and possibly sometimes bleeding. RP 153. She also testified that she encountered blood inside the cervix, but that she attributed that to Ms. Lattiak being on her menstrual period at the time. RP 155.

Detective Boswell, without foundation and without objection, was allowed to testify that injuries in cases of anal rape "just don't show up". RP 183. The following questioning of Detective Boswell and her answers also took place upon the State's redirect examination:

Q: alright. Now, as a Detective are you on-call?

A: yes.

Q: okay. When you're woken up like that, Do you have an exact recall of everything that's happening?

A: no, I've stood up in the bedroom looking around trying to wake up, so ...

Q: have you ever made it to your phone without knowing how you got there?

A: (no audible response)

Q: exactly?

A: I wouldn't say that exactly, But –

Q: okay.

A: – but I've been groggy when I've been woken up.

Q: Okay. In your personal experience, if you're asleep, are you able to know exactly what's happening to you?

DEFENSE ATTORNEY: I would object on relevance grounds as to –

THE COURT: sustained.

RP 207 - 208. The Court was not asked to strike the testimony set forth above; and was not asked to instruct the jury to disregard the testimony above.

Forensic scientist Laura Kelly testified that sperm cells were found on the anal swabs that had been applied to Ms. Lattiak at the hospital. RP 236. She further testified that the DNA profile obtained from the male component from the sperm cells was a match to the DNA profile obtained from Mr. Castro-Lino. RP 241. Ms. Kelly further testified on cross examination that the sperm that had been found could have been found in pre-ejaculate, and that she did not examine Ms. Lattiak's underwear.

The State rested and the Defense began its case, calling first Maribel Garza, Mr. Castro-Lino's live-in fiancé. RP 251. Ms. Garza testified that Mr.



Castro-Lino had drunk more than half of a 24 pack of beer between 5:00 PM and 10:30 or 11:00 PM., and that he was "really drunk" such that he "couldn't talk right". RP 252-254. Ms. Garza testified that Mr. Castro-Lino had left with the others to go to the hookah lounge where Ms. Lattiak worked and that they returned at approximately 2:00 AM, bringing Ms. Lattiak with them. RP 254-255. Once home, all of the people who had returned to the house, including Mr. Castro-Lino, continued to drink. RP 256. Ms. Garza went back to bed at approximately 4:00 AM and next saw Mr. Castro-Lino at approximately 6:00 AM when he returned to the bedroom to go to sleep. RP 260. At 8:00 A.M., Ms. Garza's son, Chris, entered her room and told her and Mr. Castro-Lino that Ms. Lattiak was claiming that someone had "touched her". RP 261. Ms. Garza also testified another individual, named Adam, was also present at the house that night, drinking with the others. RP 273-276. She had last seen Adam at approximately 4:00 A.M., the last time she got up to see if anyone was still in the house. RP 297.

Chris Garza also testified that Mr. Castro-Lino had been drinking a great deal of beer at home and had drunk "Almost a whole case of 24 pack" before leaving the house for the hookah lounge. RP 302-304. Chris Garza also said that Mr. Castro-Lino continue drinking in the parking lot of the hookah lounge from cases of beer which were in the trunk of the vehicle. RP 304. Mr. Castro-Lino

continued to drink once they returned to the house. RP 307. Among the others, there was another individual at the house, nicknamed "Moody". RP 306. Moody and Marissa both slept on Chris Garza's bed. RP 309.

On cross examination, Mr. Garza agreed that only Mr. Castro-Lino and one other individual at the house been old enough to purchase alcohol for all of the other, underage people at the house to drink. RP 317. Mr. Garza did not remember Adam having been at the house that night. RP 318.

Robert Dalton, Chris Garza's best friend, had also been at the house that night and recalled seeing Adam at the House. RP 331-332. Mr. Dalton had been at the house but left at about 2:30 AM to go home, and then had only been at the home for short time the next morning in response to Ms. Lattiak's request for a ride home. RP 336, 342.

Adam, whose full name is Hamed Mohammed, testified that he arrived at the house at approximately 2:30 or 3:00 A.M.. RP 348. Mr. Mohammed also testified that Mr. Castro-Lino appeared "pretty drunk". RP 351. Mr. Mohammed further testified that he had seen Mr. Castro-Lino and Ms. Lattiak flirting with one another. RP 353-354. Upon leaving to go home, Mr. Mohammed searched for Mr. Castro-Lino to say goodbye and saw him on the bed with Ms. Lattiak engaging in what appeared to be consensual sex with Ms. Lattiak, with Moody sleeping on the same bed. RP 355.

Following Mr. Mohammed's testimony, the court took a break for 19 minutes and 54 seconds. RP 390. Upon resuming trial, the Defense stated that it would not be calling Dr. Riesberg, the memory expert. RP 390. The Defense also stated that it would be presenting no further evidence. No mention was made of Mr. Castro-Lino not testifying and no colloquy was held between the Court and Mr. Castro-Lino discussing his right to testify at his trial.

#### JURY INSTRUCTIONS

In defining reasonable doubt, Jury Instruction number 3 read, in part,

It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

RP 408.

Jury Instruction number 7 read

a person commits the crime of rape in the second degree when he engages in sexual

intercourse with another person when the other person is incapable of consent by reason of being physically helpless or mentally incapacitated.

RP 409.

Jury Instruction number 11 read

Mental incapacity is a condition existing at that time of the offense that prevents a person from understanding the nature or consequences of the act of sexual intercourse, whether that condition is produced by illness, defect, the influence of a substance or by some other cause. A person is physically helpless when the person is unconscious or for any other reason is physically unable to communicate unwillingness to act.

RP 411.

#### CLOSING ARGUMENT

The State began its closing argument by stating, "the defendant is a predator who abused and violated Marissa Lattiak when she was intoxicated,

when she was asleep, and that he violated her in the worst way we could think of". RP 414.

In addressing the sexual assault examination, the State said," ... it doesn't sound like a very pleasant process, obviously it's invasive, the body's being examined, samples are being taken ... ". RP 419. "[T]here's no way to put this politely-from inside her anus inside her rectum from the swab that the nurse collected." RP 421.

Regarding Ms. Lattiak's credibility, the State said, " ... if all the evidence that the State had was simply Marissa's testimony, and if you believed her testimony, *as you should* given the evidence, that alone, her testimony alone would be enough evidence for you to find him guilty". RP 418 (emphasis added).

In attacking the Mr. Castro-Lino's predicted theory of the case, the State said,

... we know the Defendant's story, his version of what supposedly happened, which is basically a denial, 'no, I, I didn't have sexual intercourse with her at all.' He's shocked by the allegations. He's shocked that she would accuse him. There's no way he would've done it. There's no way because

he knows that this is somebody that Chris had been interested in, so of course, no, I would he do that with the young girl that his stepson is interested in. So he denies it. He denies it at that point. And he says, 'well, you know, I don't have the best memory of it and I was drinking', so maybe he tries to build in a little wiggle room. But that's the problem with that is (sic) he's had some time to think about the story and for a guy with a bad memory of the night because he so heavily intoxicated, he seems to remember everything other than that.

RP 420. The State highlighted the fact that the Defense theory appeared to be that Mr. Castro-Lino was unable to recall any of the events that night, when he spoke with detective Boswell, but yet he was able to recall that she had told him she was a vegetarian. RP 92.

Mr. Castro-Lino did not testify at trial.

The State also argued that “ ... physical helplessness includes where you’re unconscious, where you're asleep. Mental incapacity can because by intoxicating” (sic). RP 424.

On the subject of reasonable doubt, the State said, " reasonable doubt is a doubt for which a reason can be given. And if after looking at all the evidence fully and carefully you have a belief, a belief that the defendant did these things, a belief that he's guilty, a belief that abides throughout your deliberations then at that point you're convinced as the law requires, and at that point it becomes your duty under the to find the defendant guilty ...". RP for 424-425.

The Defense did not object do any of the State’s closing arguments.

The defense attorney argued that Mr. Castro-Lino had been drinking a great deal and was quite drunk that night even before going to the hookah lounge. RP 427. "The problem is that he was drunk that evening on January 4th so. He was so drunk that he couldn't remember very much from that evening, so there wasn't that much to be said". RP 436. "José was incredibly intoxicated the evening of January 4th". RP 437." The Defendant is not required to testify. José already explain his side of the story to Detective Boswell and there's not much to add. He's blackout drunk, he doesn't remember." RP 438.

On rebuttal, the State said, "[y]ou will not find any evidence of why she would falsely accuse him. You may have heard some speculation, but there's no

evidence of why she would falsely accuse him." RP 441. [H]e actually denied that it happened, he said he was shocked, there was no way ... the reason that we now get to this she was consenting defense is because their stuck ... we have the DNA, so now it's consent. Before it was there was no sex. Before there was the DNA results, no sex, no way, shocked. Now that we have the DNA we have a shift, it was consensual." RP 442. "Maribel testified that he's talked to her about this event. He's never said that — told her it was consensual. That's the claim, but it's never been — just think about that." Id.

Summarizing the Defense argument in closing that the Defense is not required to provide a reason for Ms. Lattiak falsifying her claim against Mr. Castro-Lino, the State went on, " ... they say, 'well, we don't have to give you a reason, we don't have any reasons,' but if you want to say that somebody's lying, if you want to plausibly argue that, you better have a reason. You better have something that makes sense ... ask yourselves if the attention that she received was any fun. When did the fun begin for Marissa? Was it when she was fleeing the house and tears? Was it when she was at the hospital being examined internally and having evidence collected? Was it fun when she had to come in and talk to the defense?" RP 447-448. She's lying", but there's no evidence to support that." RP 448.



In assessing Mr. Castro-Lino's character, the states said, "[h]e's 30, he's hanging out, partying with a group of teenagers, drinking heavily, providing the teens with alcohol. Does that scenario kind of tell you a little bit about what his motives are? About what he perceives boundaries?". RP 449.

In summary, the State said, "as we heard in void dire, many cases like this go unreported. Marissa, she had the strength, she had the courage to tell what happened to her, to go through this process which isn't fun, which isn't enjoyable for a victim, she had the strength to come into to court and describe what happened to her. But now it's your turn. It's your turn to have the strength to look at the evidence fully and fairly and find the defendant guilty of rape in the second degree." 449-450.

The court recessed for jury deliberation at 10:15 AM. RP 452. At 2:19 PM, the jury returned with the verdict, finding Mr. Castro-Lino guilty as charged. RP 454-455.

#### POST TRIAL

On May 29, 2015, Mr. Castro-Lino filed a motion for a new trial based in part upon the violation of his right to testify on his own behalf. Vol. 2, RP 27, 39, CP 110. At the hearing, Mr. Castro-Lino's trial attorney was examined by Mr. Castro-Lino's substitute attorney. Vol. 2, RP 30. At the hearing, Mr. Castro-Lino's trial attorney admitted that Mr. Castro-Lino had maintained his desire to testify

throughout his trial. Vol. 2, RP 38. During the break following the last defense witness, at the hearing on the motion for a new trial, the trial attorney said, "Mr. Castro-Lino expressed that he does want to testify and tell his side. I advised him at that time it's probably not a good idea, explain the reasons why ... so we decided not to have him testify." Vol 2, RP 38. The trial attorney explained that he "didn't want to take the risk of having Mr. Castro-Lino testify to something that was contrary to what he told law enforcement one year prior". Vol 2, RP 39. The trial attorney admitted that Mr. Castro-Lino wanted to correct the statement that he had made to the police. Vol 2, RP 39. Mr. Castro-Lino had been most concerned about explaining the DNA evidence which had become available following his interrogation. Vol 2, RP 50. The trial attorney further explained that he had retained a memory expert to explain why Mr. Castro-Lino had recovered some memory of the night he allegedly raped Ms. Lattiak. Vol.2, RP 39-40.

At the hearing on his motion for a new trial, Mr. Castro-Lino was not asked to explain by his new attorney what his testimony would have been had he been allowed to testify at his original trial. Vol 2, RP 68.

### **ARGUMENT**

A. ***The Court erred when it denied the Defendant's motion for a new trial based upon the defendant being prevented from testifying at his trial by his trial attorney.***

It is well established that the ultimate decision whether or not to testify rests with the defendant. *State v. Thomas*, 128 Wash.2d 553, 558, 910 P.2d 475 (1996). If the decision to testify is made against the will of the defendant, it is follows that the defendant has not made a knowing, voluntary, and intelligent waiver of his right to testify, as required. *United States v. Teague*, 908 F.2d 752, 759 (11th Cir.1990), vacated by 932 F.2d 899 (11th Cir.1991), reversed on rehearing on other grounds en banc, 953 F.2d 1525 (11th Cir.1992). Therefore, a defendant's right to testify is violated if "the final decision that he would not testify was made against his will." 908 F.2d at 759. See also *Jordan v. Hargett*, 34 F.3d 310, 312-13 (5th Cir.1994); *Lema v. United States*, 987 F.2d 48, 53 (1st Cir.1993) (right to testify is violated if a defendant's will to testify is "overborne" by defense counsel). Courts have held that a defendant's right to testify is violated not only when an attorney uses threats and coercion against his client, but also when the attorney flagrantly disregards the defendant's desire to testify. *United States v. Robles*, 814 F.Supp. 1233, 1242 (E.D.Pa.1993); *United States v. Butts*, 630 F.Supp. 1145, 1147 (D.Me.1986). This is not to say that defendants who accept tactical advice from their attorneys on the decision to testify can later claim that their right to testify was denied. *State v. Hardy*, 37 Wash.App. 463, 466-67,

681 P.2d 852 (1984); *State v. King*, 24 Wash.App. 495, 500, 601 P.2d 982 (1979).

We must distinguish between cases in which the attorney actually prevents the defendant from taking the stand, and cases in which counsel "merely advise[s][the] defendant against testifying as a matter of trial tactics." *King*, 24 Wash.App. at 499, 601 P.2d 982. Furthermore, while the decision to testify should ultimately be made by the client, it is entirely appropriate for the attorney to advise and inform the client in making the decision to take the stand.

"Unaccompanied by coercion, legal advice concerning [the] exercise of the right to testify infringes no right, but simply discharges defense counsel's ethical responsibility to the accused." *Lema*, 987 F.2d at 52 (citations omitted).

In this case, the plan had always been for Mr. Castro-Lino to testify. He had indicated that desire to his attorney from the beginning and, in fact, his attorney had retained a memory expert for purposes of helping the jury understand why Mr. Castro-Lino's memory had been regained somewhat since his initial interrogation by Detective Boswell. Even during a brief, 19 minutes and 54 second break following the testimony of the defense' last witness, Mr. Castro-Lino expressly repeated his desire to testify and tell his side. During that brief break, his attorney told him that it was not a good idea. And though his trial attorney explained that he did not want to take the risk of having Mr. Castro-Lino testify "contrary" to what he told the detective a year earlier, characterizing

regained memory as contrary to no memory at all is not reasonable. It is, in fact, completely consistent with the tactics planned for that trial. The only evidence the jury was left with was Mr. Castro-Lino telling the detective that he did not recall the events and that, were DNA evidence to be presented, he would agree that it was an indication of his guilt.

Mr. Castro-Lino's acquiescence in the decision for him to not testify was not a knowing, voluntary and intelligent decision. His long-stated desire to testify which, under the evidence presented here, would have been extremely helpful, was undone in a matter of minutes by his attorney's last-minute decision that Mr. Castro-Lino would not testify.

**B. *It was ineffective assistance of counsel for the substitute, post-trial attorney to fail to elicit from Mr. Castro-Lino how he would have testified had he been allowed to testify at his trial, and such ineffective assistance of counsel requires a remand for an evidentiary hearing to make such determination.***

A criminal defendant is guaranteed the effective assistance of counsel in defending against allegations of criminal conduct. Sixth Amendment, U.S. Constitution. In order to establish a claim of ineffective assistance of counsel, a defendant must show that 1) counsel's conduct was deficient; and that 2) the deficient performance resulted in prejudice. *State v. Reichenbach*, 153 Wn.2d 126, 101 P.3d 80 (2004), *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to establish a deficient performance, the

OPENING BRIEF OF APPELLANT - 19

defendant must show that council's performance fell below an objective standard of reasonableness. *Reichenbach*, at 130. In order to show prejudice, the defendant must show that, but for council's deficient performance, the outcome of the trial would have differed. *Id.* Ineffective assistance of counsel claims are a mixed question of fact and are therefore reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

It is well established law that in a motion for a new trial based upon a criminal defendant's claim that he was prevented from testifying at trial due to the conduct of his trial attorney, the defendant must establish that he was actually prevented from testifying; and that his testimony would have a "reasonable probability" of effecting a different outcome. *State v. Robinson*, 138 Wn.2d at 768. In other words, at the evidentiary hearing that was held in this matter on this claim, Mr. Castro-Lino should have been given an opportunity to set forth what his trial testimony would have been so that the court could have made a fair determination whether or not he was prejudiced by the substandard representation.

Ironically, however, Mr. Castro-Lino's substitute attorney similarly failed to establish what his testimony would have been had he been allowed to testify. To fail to offer such testimony is ineffective assistance of counsel. Moreover, due to the fact that such testimony was not offered, the court had no way of

knowing what difference, if any, it may have made. This matter should be remanded to the trial court for an evidentiary hearing wherein Mr. Castro-Lino has an opportunity to offer such testimony to see whether he can establish that he was prejudiced by the deficient performance.

C     ***It was ineffective assistance of counsel to fail to object to the prosecuting attorney's inflammatory comments and expressions of personal belief, and such misconduct by the prosecuting attorney requires reversal of the Defendant's conviction.***

Prosecuting attorneys are quasi-judicial officers who hold a special position with regard to the public and jurors in a jury trial. Prosecutors are “presumed to act impartially in the interest only of justice. If he lays aside the impartiality that should characterize his official action to become a heated partisan ... he ceases to properly represent the public interest, which demands no victim, and asks no conviction through the aid of passion, sympathy or resentment.” *State v. Reed*, 102 Wn.2d 140, 684P.2d 699 (1984). The State may not use prejudicial, or inflammatory language to characterize the alleged acts of the defendant, either in its questioning of witnesses, argument to the Court in the presence of the Jury, or in opening statement, and closing arguments. *State v. Pirtle*, 127 Wn.2d 904 (1995); *State v. Guizzotti*, 60 Wn.App. 289.

Further, expressions of personal belief or inflammatory statements regarding witnesses or evidence are improper and a violation of the Rules of Professional Conduct. If it is determined that such comments presented a

substantial likelihood that the jury's outcome was affected thereby, the confidence in the jury verdict is undermined and a reversal is required. *Id.*

Here, the State's inflammatory statements, calling Mr. Castro-Lino a "predator" and focusing the Jury's attention upon the sexual assault examination that had been administered to Ms. Lattiak, were both passionate arguments unbefitting a quasi-judicial officer. Moreover, reminding the jury that the sexual salt examination involved placing a swab inside Ms. Lattiak's rectum were little more than prejudicial comments unbefitting the office of the prosecutor, intended to inflame the jury's passion, and designed to deprive the Defendant of a fair trial. Such statements serve no legitimate purpose, are irrelevant and, as being prejudicial to the outcome of the trial, objectionable. Defense counsel's failure to object to such statements constituted ineffective assistance of counsel.

The State also expressed a personal belief in the strength of the evidence when it addressed the testimony of Ms. Lattiak, saying, "if you believed her testimony, *as you should*", that the jury would have to find Mr. Castro-Lino guilty of the crime of rape in the second degree. Such a statement implying a personal belief as to the credibility of a witness' statement, whose testimony is the sole evidence of guilt, is impermissible and likely had an impact upon the jury deliberations. Defense counsel's failure to object could not be considered a legitimate trial strategy, it allowed the State to express a personal opinion



regarding the credibility of the State's primary and only percipient witness, and was therefore ineffective assistance of counsel.

Such misconduct requires reversal and a new trial. *Id.*

**D. *It was ineffective assistance of counsel to fail to object when the prosecuting attorney committed prosecutorial misconduct by shifting the burden of proof by stating that the Defendant Bore the responsibility of establishing why Ms. Lattiak would falsely accuse him of rape, and such misconduct by the prosecuting attorney requires reversal of the Defendant's conviction.***

To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutors argument was improper and prejudicial. *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). The alleged improper statements are viewed in the context of the entire argument, the issues of the case, the evidence and the jury instructions. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

A criminal defendant has no duty to present evidence, and it is error for the prosecutor to suggest otherwise. *State v. Cheatham*, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). An argument that shifts the State's burden to prove guilt beyond a reasonable doubt constitutes misconduct. *State v. Thorgerson*, 172 Wn.2d 438, 453, 258 P.3d 43 (2011); *State v. Gregory*, 158 Wn.2d 759, 859-61, 147 P.3d 1201 (2006). See also *State v. Osman*, 192 Wn.App. 355 (Wash.App.Div 1 2016).

In this case, the Defense correctly argued on closing that Mr. Castro-Lino was not required to provide a reason that Ms. Lattiak would falsely accuse Mr.

Castro-Lino. The State countered by saying on rebuttal, "if you want to say that somebody's lying, if you want to plausibly argue that, you better have a reason. You better have something that makes sense". In doing so, the State effectively shifted the burden of proof or rather created a burden of proof for the Defendant to explain why Ms. Lattiak would falsely accuse Mr. Castro-Lino of rape. The Defendant had no such burden and to imply that he did was error and misconduct. The statement was both improper and prejudicial. Defense counsel's failure to object constituted ineffective assistance of counsel and deprived Mr. Castro-Lino of the fair trial. Such misconduct and failure to object requires reversal for a new trial where such improper and prejudicial statements are not allowed.

**E. *It was ineffective assistance of counsel to fail to object when the prosecuting attorney committed prosecutorial misconduct by mis-stating the law and reducing the State's burden of proof to establish proof beyond a reasonable doubt, and such misconduct by the prosecuting attorney requires reversal of the Defendant's conviction.***

"Like the Hydra slain by Hercules, prosecutorial misconduct has many heads". *United States v. Williams*, 504 U.S. 36, 112 S.Ct. 1735, 118 L.Ed.2d 352, 60 U.S.L.W. 4348 (1992). A prosecutor's improper comments during closing arguments may "so infect the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

Instructive on this issue is the analysis in the federal court system. The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape nor innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused, when they should properly carry none. *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

In his closing argument, the prosecuting attorney implied that if the jury thought Mr. Castro-Lino was guilty when they started their deliberations and continued to think he was guilty throughout deliberations then they have met the

legal standard and had a duty to find him guilty. However, nowhere does the instruction say it is their duty to find the Defendant guilty at all, let alone following a belief which lasts for only four hours. The prosecutor's argument mischaracterizes "abiding" as associated with the timing of the deliberations rather than abiding as a steadfast, continuing, somewhat permanent belief. It was an incorrect statement of law, was improper and prejudicial. As such Mr. Castro-Lino did not receive a fair trial and his matter should be remanded for a new trial.

### **CONCLUSION**

For all of the reasons above, the Defendant's conviction should be reversed for a new trial or at least remanded for an evidentiary hearing to determine what, if any, difference his testimony would have made had he not been prevented from testifying at his trial.

DATED this 30 day of June, 2016.

Respectfully Submitted,



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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

**CERTIFICATE OF SERVICE**

I certify that I have provided a copy of the Appellant's Opening Brief by first class mail on the below-named, by mailing to said individuals copies thereof, contained in sealed envelopes, with postage prepaid, addressed to said individuals at said individuals' last known addresses as set forth below, and deposited in the post office at Vancouver, Washington on said day.

By way of United States Postal Service, First Class Mail to the Following:

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Dated this 30 day of June, 2016



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YESENIA PIEDRA